UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRAGRANCENET.COM, INC., Plaintiff, – against – FRAGRANCEX.COM INC., Defendant.	ORDER 06-CV-2225 (JFB)(AKT)

JOSEPH F. BIANCO, District Judge:

By letter dated June 19, 2007, plaintiff requests that this Court certify for immediate appeal the Court's June 12, 2007 Memorandum and Order denying plaintiff's motion to amend the complaint.

Pursuant to 28 U.S.C. § 1292(b), a district court may certify an immediate appeal of an interlocutory order if the court finds that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." However, "[d]istrict court judges have broad discretion to deny certification even where the statutory criteria are met." *SPL Shipping Ltd. v. Gujarat Cheminex, Ltd.*, No. 06-CV-15375 (KMK), 2007 WL 1119753 (S.D.N.Y. Apr. 12, 2007) (quoting *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 166 (E.D.N.Y. 1999) (stating that the authority to deny certification, even where the three statutory criteria are met, is "independent" and "unreviewable")) (additional citation omitted). The Second Circuit has held that "Congress passed 28 U.S.C. § 1292(b) primarily to ensure that the courts of appeals would be able to 'rule on . . . ephemeral

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question[s] of law that m[ight] disappear in the light of a complete and final record,'" and that "Congress also sought to assure the prompt resolution of knotty legal problems." *Weber v. United States*, – F.3d –, 2007 WL 1097077 (2d Cir. Apr. 13, 2007) (quoting *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 864 (2d Cir. 1996)) (additional citations omitted). Therefore, interlocutory appeal is "'a rare exception' where, in the discretion of the district judge, it 'may avoid protracted litigation.'" *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) (quoting *Koehler*, 101 F.3d at 865-66 (2d Cir. 1996)).

The Court finds that certification of the June 12, 2007 Memorandum and Order for immediate appeal is unwarranted. As stated in the June 12, 2007 Memorandum and Order, this Court's ruling is consistent with the decisions of other district courts within the Second Circuit as well as with Second Circuit case law.

Furthermore, granting plaintiff's motion for an interlocutory appeal will not avoid protracted litigation as plaintiff's pending claims are unrelated to plaintiff's proposed claims that were the subject of the June 12, 2007 Memorandum and Order. In particular, the original claims involve only the alleged unauthorized use by defendant on its website of photographs in which plaintiff claims copyrights. The new claims, on which the Court denied leave to amend, relate only to the alleged internal use of plaintiff's alleged trademark as a keyword to prompt defendant's appearance as a sponsored link in Google's search engine and by inclusion in defendant's website metatags. It does not appear to the Court that there are intertwined legal or factual issues on these separate claims. Thus, piecemeal litigation will not substantially impact discovery and a determination of liability on the copyright claims will not impact the trademark claims that plaintiff now seeks to appeal. Accordingly, there is little risk of piecemeal or protracted litigation.

Accordingly, plaintiff's motion to certify this Court's June 12, 2007 Memorandum and Order for interlocutory appeal is DENIED.

SO ORDERED.

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JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: July 2, 2007
Central Islip, NY